# Harun bin Abd Rahim & Anor v Jamian bin Mashood & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12B-317 OF 2010
VERNON ONG J
3 APRIL 2012

*Civil Procedure — Appeal — Facts, finding of — Road accident — Trial judge found that respondents were not liable for negligence — Whether trial judge erred — Whether appellate court should interfere*

*Evidence — Burden of proof — Road accident — Proof on balance of probabilities — Whether plaintiffs had discharged their evidential burden*

The first plaintiff, who was riding his motorcycle with the second plaintiff as his pillion rider, claimed that when he approached a junction along Jalan Gangsa, his motorcycle had collided into a motorbus driven by the first defendant. The motorbus that was travelling in the same direction had allegedly made a sudden left turn at the junction thereby causing the first plaintiff to swerve left and lose control of his motorcycle. Consequently the plaintiffs suffered loss and damages and filed an action against the defendants. It was the first plaintiff's pleaded case that the first defendant's negligence had caused him to lose control of his motorcycle. The sessions court judge ('SCJ') found that the plaintiffs had failed to prove that the defendants were negligent. This was the plaintiffs' appeal against the SCJ's decision on liability and quantum.

**Held**, dismissing the appeal with costs:

(1) The SCJ had erred when he misdirected himself on the evidence by finding that since there was no damage to the motorbus there was no accident and that the plaintiff had failed to prove the claim of negligence. Instead, the SCJ in the present case ought to have directed his mind to the question of whether the bus made a sudden turning at the junction thereby causing the first plaintiff to lose control of his motorcycle (see paras 14–15).

(2) However, as a general rule the High Court sitting as an appellate court would not interfere with the findings of fact by a trial sessions judge unless it could be shown that there were exceptional circumstances. In the present case, although the first plaintiff testified that his motorcycle had collided into the left bumper of the motorbus, that evidence contradicted his police report and his pleaded case. In the light of the plaintiffs'

contradictory evidence and on the totality of the evidence, it was found that the plaintiffs had failed to discharge the evidential burden of proving their case on a balance of probabilities. Consequently, this court was not inclined to interfere with the SCJ's decision on liability (see paras 7, 19–20 & 23–24).

(3) There was nothing to show that the award of damages to the plaintiffs in the present case was a wholly erroneous estimate of the damages or wrong in law. Consequently the SCJ's award on quantum was also affirmed (see paras 30 & 36).

**[Bahasa Malaysia summary**

Plaintif pertama yang menunggang motosikalnya dengan plaintif kedua sebagai pembonceng, mendakwa bahawa apabila dia menghampiri persimpangan di Jalan Gangsa, motosikalnya telah merempuh motorbas yang dipandu oleh defendan pertama. Motorbas yang dipandu di arah yang sama telah didakwa membuat pemusingan ke kiri dengan mengejut di persimpangan tersebut dengan itu menyebabkan plaintif pertama membelok kiri dan hilang kawalan motosikalnya. Akibatnya, plaintif-plaintif mengalami kerugian ganti rugi dan memfailkan tindakan terhadap defendan-defendan. Ia adalah kes plid pertama plaintif bahawa kecuaian defendan pertama telah menyebabkan ia hilang kawalan motosikalnya. Hakim mahkamah sesyen (HMS') mendapati bahawa plaintif-plaintif gaggal untuk membuktikan bahawa defendan-defendan adalah cuai. Ini adalah rayuan plaintif terhadap keputusan HMS atas liabiliti dan kuantum.

**Diputuskan**, menolak rayuan dengan kos:

(1) HMS tersilap apabila beliau tersalah arah diri atas keterangan dengan mendapati bahawa memandangkan tidak terdapat kerosakan kepada motorbas tidak terdapat kemalangan dan bahawa plaintif gagal untuk membuktikan tuntutan kecuaian. Sebaliknya, HMS dalam kes ini patut mengarahkan fikirannya kepada persoalan sama ada bas tersebut membuat pusingan tiba-tiba di persimpangan dengan itu menyebabkan plaintif pertama hilang kawalan motosikalnya (lihat perenggan 14–15).

(2) Walau bagaimanapun, sebagai peraturan am Mahkamah Tinggi mendengar sebagai mahkamah rayuan tidak akan campur tangan kecuali ia dapat menunjukkan bahawa terdapat keadaan yang luar biasa. Dalam kes ini, walaupun plaintif pertama memberi keterangan bahawa motosikalnya telah merempuh bampar kiri motorbas, keterangan tersebut bercanggah dengan laporan polisnya dan kes plidnya. Berdasarkan keterangan bercanggah plaintif-plaintif dan atas keseluruhan keterangan, ia didapati bahawa plaintif-plaintif gagal untuk melepaskan beban untuk membuktikan kes mereka atas imbangan

kebarangkalian. Akibatnya, mahkamah ini tidak cenderung untuk campur tangan dengan keputusan HMS atas liabiliti (lihat perenggan 7, 19–20 & 23–24).

(3) Tidak terdapat apa-apa untuk ditunjukkan bahawa award ganti rugi kepada plaintif-plaintif dalam kes ini adalah anggaran ganti rugi yang secara keseluruhannya salah atau kesalahan dari segi undang-undang. Akibatnya award HMS atas kuantum juga disahkan (lihat perenggan 30 & 36).]

**Notes**

For cases on facts, finding of, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1169–1173.

**Cases referred to**

*Clarke v Edinburgh Tramways Co* [1919] SC 35, HL (refd)

*Lim Kim Chet & Anor v Multar bin Masngud* [1984] 2 MLJ 165, PC (refd)

*Sepang Omnibus Sdn Bhd v Christina Loh Soo Pang & Ors* [1970] 2 MLJ 234, FC (refd)

*Teoh Chu Thong v Anantha Kiruisan PSR @ Anantha Krishnan & Anor* [2008] 3 MLJ 559; [2008] 2 CLJ 603, CA (refd)

*P Sunthara Jothi (M Kumar & Co) for the appellants.*
*Christina Edwin Jacob (Lawrence Pereira & Partners) for the respondents.*

**Vernon Ong J:**

**[1]** This is the plaintiff's appeal against the decision of the sessions court judge on liability and quantum.

LIABILITY

**[2]** According to the statement of claim (SOC), P1 was riding a motorcycle with P2 riding pillion along Jalan Gangsa heading towards Pasir Gudang on 23 September 2007.

**[3]** When P1's motorcycle approached the junction of Jalan Perjiranan 9, a motorbus driven by D1 in the same direction along Jalan Gangsa to P1's right, made a sudden turning into the junction causing P1 to lose control of his motorcycle and serve to the left in order to avoid colliding into the motorbus.

**[4]** Consequently, the plaintiffs suffered loss and damages.

**[5]** The SOC did not state that there was a collision; only that P1's motorcycle lost control when P1 attempted to avoid colliding into the motorbus. A

**[6]** The learned SCJ found that the plaintiffs have failed to prove that the defendants were negligent premised on the following of fact: B

(a) based on the investigating officer (SP1)'s testimony, there was no evidence to show that D1's motor lorry was involved in an accident with P1's motorcycle.

(b) there was no damage to the motorbus. C

(c) there was no sign of an accident such as glass fragments at the accident site.

(d) under cross-examination, SP1 agreed that his evidence-in-chief that the motorcycle collided into the motorbus as the motorbus was making a left turn was not true as he did not witness the accident. D

(e) SP1 said that the width of lane A-A1 did not allow both the motorbus and the motorcycle to travel side by side. Therefore, it was P1's evidence that the motorbus was travelling to his right before the accident was not probable. E

(f) the fact that there was a collision between the two motor vehicles is a material fact and was the basis of the plaintiff's claim. In his police report, P1 did not say that there was a collision between the motorbus and his motorcycle; therefore this omission by P1 is not reasonable. F

(g) the fact that there was no signs of the accident and no damage to the motorbus is consistent and supported by the oral evidence of SP1 and the silent evidence.

The issue of liability turns entirely on questions of fact. G

**[7]** As a general rule, the High Court sitting as an appellate court will not interfere with the findings of fact by a trial sessions judge or magistrate unless it can be shown that there are exceptional circumstances. H

**[8]** In this respect, the role of the appellate court in a case such as this may be summarised as follows.

**[9]** Firstly, the appellate court should start on the premise that the trial judge have had the benefit and advantage of hearing and seeing the witnesses before making a conclusion or inference on the weight of the evidence. I

**[10]** Second, the appellate court should consider whether, without those

advantages, there was anything to justify a finding that the trial judge was plainly wrong (see Gopal Sri Ram JCA's (later FCJ) dictum in *Teoh Chu Thong v Anantha Kiruisan PSR @ Anantha Krishnan & Anor* [2008] 3 MLJ 559; [2008] 2 CLJ 603 (CA) citing Lord Shaw Dunfermline's dictum in *Clarke v Edinburgh Tramways Co* [1919] SC (HL) 35, 36).

**[11]** In order to satisfy the appellate court that the trial judge was plainly wrong, it is incumbent upon the appellant to show exceptional circumstances.

**[12]** Exceptional circumstances may arise if it can be shown that the trial judge has failed to judicially appreciate the evidence or failed to consider any material evidence or had acted upon some irrelevant evidence so as to render his decision wholly erroneous or so unreasonable that no reasonable tribunal would have come to that conclusion. Other instances include making wrong inference from the facts (*Sepang Omnibus Sdn Bhd v Christina Loh Soo Pang & Ors* [1970] 2 MLJ 234 (FC)); misapprehending the facts; or where the reasons given by the trial judge was unsatisfactory or contradictory of each other (*Lim Kim Chet & Anor v Multar bin Masngud* [1984] 2 MLJ 165 (PC)).

**[13]** It is the plaintiffs' pleaded case that there was no collision; but that P1 crashed his motorcycle when he lost control and attempted to avoid colliding into the motorbus which made a sudden left turn.

**[14]** The SCJ ought to have directed his mind to the question of whether the motorbus made a sudden turning at the junction thereby causing P1 to lose control of his motorcycle.

**[15]** Instead the SCJ erred when he misdirected himself on the evidence in finding that since as there was no damage to the motorbus, there was no accident and therefore the plaintiffs have failed to prove the claim of negligence.

**[16]** According to P1's police report, P1 said that a motorbus made a sudden left turn at the junction causing him to fall by the road side.

**[17]** In his evidence, P1 said as he was near the junction, a motorbus cut it from behind and suddenly turned left into the junction; and that he tried to avoid hitting the motorbus but knocked into the front bumper of the motorbus.

**[18]** Under cross-examination, P1 agreed that he did not say in his police report that the motorbus collided into his motorcycle or that he knocked into the motorbus.

**[19]** P1 said that his motorcycle collided into the left bumper of the motorbus. **A**

**[20]** On this point, it is clear that P1's evidence that his motorcycle knocked the motorbus front left bumper contradicts his police report and his pleaded case. **B**

**[21]** The evidence of SP1 the investigating officer was not particularly helpful as it shed no light on whether the accident occurred or not. **C**

**[22]** In the circumstances, the court is left in a real state of doubt as to how the accident occurred.

**[23]** In the light of the plaintiffs' contradictory evidence and on the totality of the evidence, it is the court's finding that the plaintiffs have failed to discharge the evidential burden of proving their case on a balance of probabilities. **D**

**[24]** Consequently, *the court is not inclined to interfere with the SCJ's decision on liability.* **E**

QUANTUM

**[25]** It is settled law that an appellate court should not interfere with an award of damages unless it is satisfied that the judge had acted on a wrong principle of law, or has misapprehended the facts, or for some reason or other made a wholly erroneous estimate of the damages or the amount awarded so excessive or insufficient as to lead to the conclusion that some error in principle must have taken place. **F** **G**

**[26]** Or if it can be shown that the award is extremely inconsistent with the discernible trend of that the award was made on some misapprehension of facts or some erroneous assumption of law or fact. **H**

**[27]** Even if this court is inclined to differ on the quantum, it is trite that the award is a matter of the trial judge's discretion.

**[28]** Therefore, this court will be slow to interfere with the award. **I**

**[29]** The fact that the award may be slightly high or low is not a sufficient ground to interfere.

**[30]** There is nothing to show that the awards were *manifestly high or that the award was a wholly erroneous estimate of the damages or wrong in law*.

(*Rasidin*, *Topaiwah v Salleh* [1968] 1 MLJ 284; *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; *Jamiah bt Holam v Koon Yin* [1083] 1 MLJ 103; *Ng Moon Leong v Seema Balvantrai Goda* [1986] 2 MLJ (CA) Singapore 405)).

**[31]** The global award for P1 of RM80,000 for head injury and RM20,000 for bleeding nostril, bulging external auditory canal left ear and left ear hearing loss and tinnitus are reasonable and consistent with the Compendium of Personal Injury Awards.

**[32]** There was no evidence to support P1's claim for medical expenses and loss of earnings.

**[33]** The award for P2's cost of care of RM14,400 for 36 months is fair and reasonable in the circumstances as it covers the period of two years during which P2 was unable to walk and seven months that he was unable to speak.

**[34]** There was no evidence to support P2's claim for items Nos 9, 11, 13 and 15 of the SOC.

**[35]** Consequently, the SCJ was correct in rejecting the claims for the said items.

**[36]** For the aforesaid reasons, *the SCJ's award on quantum is also affirmed.*

**[37]** Consequently, *the appeal is dismissed with costs.*

*Appeal dismissed with costs.*

Reported by Kohila Nesan